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In the Supreme Court of the United States

OCTOBER TERM, 1978

C. CAREY MATTHEWS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 21-28) is reported at 569 F. 2d 941.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 1978, and a petition for rehearing was denied on May 11, 1978. On July 31, 1978, Mr. Justice Powell granted an extension to file the petition for a writ of certiorari to and including September 9, 1978, and the petition was filed on that date. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).[1]

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[1]Petitioner incorrectly cites 28 U.S.C. 2101(c) and Rule 19(b) of the Rules of the Supreme Court as the basis for jurisdiction in this Court.

QUESTIONS PRESENTED

1. Whether petitioner's plea of guilty was coerced by a threat, allegedly conveyed by the Assistant United States Attorney, that the trial judge would sentence petitioner to at least ten years' imprisonment if he refused to plead guilty and was subsequently found guilty by a jury.

2. Whether petitioner was denied a fair hearing on his coercion claim by pre-hearing extrajudicial discussions between two witnesses concerning some of the events at issue.

STATEMENT

1. On January 7, 1972, pursuant to a plea bargain, petitioner pled guilty in the United States District Court for the Southern District of Florida to one count of causing the distribution of a false and misleading proxy statement, in violation of 15 U.S.C. 78j(b) and 78ff(a) and 18 U.S.C. 2.[2] Petitioner was sentenced to five years' probation.

On June 10, 1975, petitioner filed a motion to vacate his sentence and set aside his guilty plea, pursuant to 28 U.S.C. 2255, contending that his guilty plea had been coerced and that there had been an insufficient factual basis for the plea. The motion was supported by affidavits given by the attorney who represented petitioner at the time of the guilty plea and by petitioner's former law partner concerning the circumstances of the alleged coercion: the government filed an affidavit given by the Assistant United States Attorney who had prosecuted the

[2]Petitioner pled guilty to Count 14 of a 19-count indictment; in return, the government agreed to dismiss the remaining counts of the indictment and to recommend a sentence of five years' probation. When petitioner pled guilty, he stated that he did not believe he had committed a crime, but wished to enter a plea of guilty in accordance with this Court's decision in *North Carolina* v. *Alford*, 400 U.S. 25 (1970). See the transcript of petitioner's entry of a guilty plea (hereafter "G.P."), dated January 7, 1972, at 3-4.

case. The district court denied the motion without an evidentiary hearing, finding that the transcript of the guilty plea proceedings established that the plea had been freely and voluntarily made and that it was supported by a sufficient factual basis (Pet. App. 1-10).

The court of appeals reversed and remanded. *Matthews* v. *United States*, 533 F. 2d 900 (5th Cir. 1976), cert. denied, 429 U.S. 1121 (1977). Although the court agreed with the district court that there was an adequate factual basis for the plea, the court of appeals held that petitioner was entitled to an evidentiary hearing on the claim that his plea had been coerced by a threat, allegedly conveyed by the prosecutor in the case, that the trial judge would sentence petitioner to at least ten years' imprisonment if he refused to plead guilty and was subsequently found guilty by a jury (Pet. App. 11-18).

2. On September 2, 1976, following the remand from the court of appeals, the district court conducted an evidentiary hearing on petitioner's allegation of coercion.[3]

Neal Sonnett, a former Assistant United States Attorney who had been in charge of the prosecution, testified that he told Irwin Block, petitioner's attorney at the time of the guilty plea, that the government would recommend a substantial jail sentence if petitioner was convicted after a trial (Tr. 13-14)[4] and that he thought the trial judge would look "dimly" on petitioner's conduct (Tr. 40, 43-44). Block requested that Sonnett meet alone with the judge in his chambers, while Block waited

[3]The district judge who conducted this hearing was not the judge who had sentenced petitioner (Pet. App. 23).

[4]"Tr." refers to the transcript of the September 2, 1976, evidentiary hearing.

outside, to see if the judge would accept an *Alford* plea from petitioner (Tr. 14-15).[5] Accordingly, Sonnett informed the judge of Block's request and told him that if petitioner pled guilty the government would recommend probation. The judge replied that he would accept an *Alford* plea and would decide whether to follow the government's recommendation after he reviewed a presentence report (Tr. 15-16). As soon as Sonnett left this meeting, he informed Block of the judge's statements and expressed his view that it would be in petitioner's "best interest to plead guilty rather than face the possibility of a long term of incarceration which would be recommended by the Government" (Tr. 15).

Sonnett further testified that the judge had not indicated to him what sentence he planned to impose; and Sonnett denied that he had ever told Block or suggested to him in any manner that the judge had given any such indication (Tr. 16, 21, 23-24, 39-40, 43-46). Sonnett added that he understood how statements he might have made on several occasions to the effect that "the court looked dimly on these kind of crimes" could have caused "a misimpression as to what [he] said" to Block (Tr. 43-44).

In his testimony at the hearing on remand, Block stated that on occasions before Sonnett's discussion with the judge about the proposed *Alford* plea, Sonnett had speculated that petitioner would get "substantial time" if convicted, that Sonnett repeated this speculation after his conversation with the judge about the plea, and that Block then "got the impression that there was some indication, no threats, no statements, but some indication from whatever was said [regarding how] the judge felt about this case * * *" and "that there would be a long

[5]Block's testimony agrees with Sonnett's account of the circumstances leading to the meeting (Tr. 61-62).

sentence" (Tr. 63, 64-65, 78-80). Block denied, however, that Sonnett had ever made any threats or ever conveyed any threats or any statements by the trial judge concerning petitioner's likely sentence, and he characterized Sonnett's remarks as "just lawyer talk" (Tr. 57, 63-65, 67, 71-73, 76). Following his meeting with Sonnett, according to Block's testimony, Block telephoned petitioner and told him that, based upon his conversations with the prosecutor, he had an "impression" that there was a possibility of a substantial prison sentence if petitioner were to be convicted (Tr. 66-68, 70-72, 79-81). Block also told petitioner that he did not consider Sonnett's statements a threat and that he did not know if the judge had said anything about a long sentence (Tr. 66, 71-72, 80).

Philip Mandina, petitioner's former law partner, who overheard Block's telephone conversation with petitioner on an extension phone, testified that Block told petitioner that "Sonnett had indicated to him [Block] that [the judge] had indicated to Mr. Sonnett that if [petitioner] was convicted * * * he would get at least * * * ten years in prison" (Tr. 89, 98).[6] Mandina stated that Block also told petitioner he did not think that the judge made the statement and Mandina agreed (Tr. 95-96, 99, 102).

Petitioner testified that Block stated that the prosecutor had told Block that the judge had threatened to impose a ten-year sentence if petitioner was convicted after a trial (Tr. 109-110, 112). Petitioner stated that he had believed the threat and that it was the "only reason" he accepted the plea agreement (Tr. 112-115, 120).

[6]Block denied making this statement (Tr. 71). Although Block's 1975 affidavit stated that Sonnett had advised him that the trial judge had "indicated" to Sonnett that petitioner "would be sentenced to a substantial term of years" if he "went to trial and was convicted," Block testified that his affidavit was true only "as far as it goes" (Tr. 57) and that it required "some elaboration" (Tr. 55).

3. After this evidentiary hearing, the district court denied petitioner's motion for vacation of his sentence, finding that the prosecutor had not conveyed any threats regarding sentencing to petitioner's counsel, and that petitioner's unfounded subjective appraisal of his attorney's conversation with the prosecutor was immaterial (Pet. App. 19-20). The court of appeals affirmed (Pet. App. 21-28).

ARGUMENT

Petitioner contends that his guilty plea was coerced by a threat, conveyed by the prosecutor, that the trial judge would impose at least a ten-year jail sentence if petitioner were convicted after a trial, and he also contends that he did not receive a fair hearing on this claim. Both contentions are without merit.

1. The court of appeals concluded that the "clear implication" of the district court's factual finding "is that Sonnett did not convey a threat [of a lengthy sentence] to Block, nor did Block transmit such a threat to Matthews" (Pet. App. 28). "Based on a careful review" of the hearing testimony, the court of appeals further determined that "the district court's finding is not clearly erroneous" (Pet. App. 27). Petitioner's contention (Pet. 20-29) that a threat was in fact conveyed to him by Sonnett through Block thus presents a factual issue that does not warrant further review in this Court. *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967); *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949).

In any event, the record clearly supports the findings of the court below. As the Statement shows (pages 4-5, *supra*), both Sonnett and Block denied that Sonnett had conveyed any threat from the judge concerning petitioner's likely sentence, and Block testified that, although he had conveyed his "impression" of Sonnett's remarks, he did not tell petitioner that the judge had made any threats. Petitioner and his former law partner, Mandina, were not parties to the conversation between Sonnett and Block outside of the trial judge's chambers, so they could give no credible testimony as to that. Although their testimony conflicted with that of Block regarding Block's statements to petitioner, the district court was free to credit Block's testimony that no threat was conveyed; and the court of appeals, obligated to give "due regard to the opportunity of the trial court to judge of the credibility of the witnesses" (Fed. R. Civ. P. 52(a)), properly upheld this finding since it was not clearly erroneous. *United States* v. *Oregon Medical Society*, 343 U.S. 326, 332 (1952); *Graver Tank & Mfg. Co.* v. *Linde Air Products Co., supra*, 336 U.S. at 275.[7]

In sum, on the basis of the facts found in this case petitioner can reasonably claim no more than that the prosecutor speculated, perhaps erroneously, about the length of the sentence petitioner might receive if he went to trial and was convicted by the jury, and that petitioner misconstrued the prosecutor's speculations and pled guilty, fearing that he might otherwise receive a long sentence. A prosecutor's speculations concerning the possible severity of a sentence are not grounds for invalidating a guilty plea. See, *e.g.*, *United States* v. *Battle*, 467 F. 2d 569, 570 (5th Cir. 1972); *Holt* v. *United States*, 329 F. 2d 368, 371 (7th Cir. 1964), cert. denied,

[7] Among the circumstances bearing on the credibility of petitioner's claim that he had been told of a threat by the judge were his denial at the time of his guilty plea that any threats had been made (G.P. 4, 6-7) and the fact that he did not raise this claim until after his motion to terminate his probation was denied, more than three years after the plea was entered (Tr. 117-118). A circumstance pertinent to the evaluation of Mandina's testimony regarding Block's alleged statements to petitioner is that Mandina had, according to his account (Tr. 94), learned from the trial judge a year after petitioner entered his plea that the judge had made no threats; yet Mandina apparently did not come forward with this evidence contradicting what he said Block had told petitioner until more than two years later, when petitioner filed his motion to vacate his sentence.

379 U.S. 992 (1965). Nor is a guilty plea rendered invalid by the fact that the defendant was induced to enter the plea by fear of a severe penalty. *Brady* v. *United States*, 397 U.S. 742, 749-751 (1970); *Micklus* v. *United States*, 537 F. 2d 381, 382 (9th Cir. 1976).[8]

2. Petitioner claims (Pet. 8-9, 30-31) that the hearing on his coercion allegation was "a farce and a travesty of justice" (Pet. 8) because Sonnett and Block met shortly before the 1976 hearing and tried to refresh their memories concerning the events that had occurred more than four years before.[9] This claim is insubstantial.

Sonnett himself volunteered the information that he and Block had discussed the matter, explaining (Tr. 43):

> If I may say, Judge, since this controversy concerning the two affidavits of Mr. Block and myself has come up, I want to clearly state that Mr. Block and I have had several conversations since that controversy.
>
> I think that we have a fairly decent recollection of this case at this point as to what took place, although neither one of us remember the words * * *.[10]

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[8]Because the record shows that no threat was made by the trial judge who accepted petitioner's guilty plea, *United States* v. *Tateo*, 214 F. Supp. 560 (S.D.N.Y. 1963), relied on by petitioner (Pet. 27-28), is inapposite. In *Tateo*, the court told the defendant in the middle of his trial that if he refused to plead guilty and proceeded with his trial and was convicted, the court would sentence him to life imprisonment on one count and consecutive maximum sentences on each of the four other counts. For the same reason, *Ramsay* v. *New York*, cert. granted, No. 77-6540 (Oct. 10, 1978), which concerns participation by the court in the plea bargaining process, has no bearing on this case.

[9]Sonnett had left the United States Attorney's office and was in private practice at the time of the hearing at issue.

[10]The affidavits referred to by Sonnett were given at the time petitioner's motion to vacate his sentence was first considered by the district court (see pages 2-3, *supra*, and Pet. App. 14).

Petitioner's counsel, who had not moved for a pre-hearing sequestration order, had ample opportunity to cross-examine Block and Sonnett on these conversations if he perceived any prejudice resulting from them. In any event, it is difficult to see how these conversations, *per se*, could render the hearing constitutionally inadequate, any more than would the fact that a year before, when petitioner first filed his motion to vacate his sentence, petitioner's representatives had transmitted to Block for his signature a "multi-page affidavit" recounting a version of the events in question that could have influenced Block's recollection of those events, even though he thereafter prepared his own affidavit (Tr. 65). See *United States ex rel. Clark* v. *Fike*, 538 F. 2d 750, 757-758 (7th Cir. 1976), cert. denied, 429 U.S. 1064 (1977).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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